

ICTR-00-61-A
(4-11-2011
(5467A-335/A))

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, *Presiding*
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Adama Dieng

Date: 4 November 2011

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-A

JUDICIAL RECORDS SECTION
ICTR

2011 NOV -14 P 1:57

GATETE'S RESPONDENT'S BRIEF

Office of the Prosecutor

Hassan Bubacar Jallow
James J. Arguin
Inneke Onsea
Priyadarshini Narayanan

Counsel for the Appellant

M-P. Poulain, Lead Counsel
V. C. Lindsay, Consultant Counsel
E. Levavasseur, Legal Assistant
C. Rivat, Legal Assistant
W. Hedef, Legal Intern

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PART I – INTRODUCTION

Background

1. On 31 March 2011, Trial Chamber III rendered a Judgement convicting Jean-Baptiste Gatete of genocide (Count 1) and extermination as a crime against humanity (Count 4) and acquitting him of rape as a crime against humanity (Count 6).¹ The Chamber did not enter cumulative convictions for genocide (Count 1) and conspiracy to commit genocide (Count 3), which was dismissed.² Mr. Gatete was sentenced to life imprisonment.³
2. On 3 May 2011, the Prosecution filed its Notice of Appeal and, on 18 July 2011, its Appellant's Brief.
3. In conformity with Rule 112 of the Rules of Procedure and Evidence, Mr. Gatete now files his Respondent Brief within 15 days of receipt of the French translation of the Judgement on 19 September 2011 and of the Prosecution's Appellant's Brief on 27 October 2011, thus in compliance with the Pre-Trial Judge's Decision on extension of time limits of 26 May 2011.

The Prosecution's Appeal

4. The Prosecution raises one ground of appeal, in which it alleges that the Trial Chamber erred when it failed to enter a conviction for conspiracy to commit genocide (Count 3), finding that cumulative convictions for genocide and conspiracy are impermissible. It requests the Appeals Chamber to correct this error of law by entering an additional conviction for conspiracy to commit genocide.

The Defence's Response

5. The Defence opposes the Prosecution's Appeal.

¹ Judgement, para.668.

² Judgement, paras.654-662,668.

³ Judgement, para.683.

6. Mr. Gatete recalls that he did not appeal the findings made in relation to conspiracy to commit genocide⁴ because Count 3 was dismissed.⁵ He refrained from lodging such an Appeal as none of the errors committed by the Trial Chamber in relation to conspiracy would have invalidated the verdict, no conviction having been pronounced. However, Mr. Gatete firmly contests the sufficiency of the evidence from which an inference of conspiracy was drawn.

7. A new conviction imposed on appeal would deny Mr. Gatete's right to have his conviction and sentence reviewed by a higher tribunal. The Prosecution's Appeal should therefore be dismissed.

⁴ Judgement, paras.613-629.

⁵ Judgement, para.668.

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PART II – RESPONSE TO ARGUMENTS ON APPEAL

8. The Prosecution claims that the Chamber erred in adopting the approach taken by Trial Chambers in *Musema* and *Popovic* and in dismissing the count of conspiracy to commit genocide as being redundant with a conviction for committing genocide. First, it argues that the *Celebici* Appeal Judgement set out a binding legal standard on cumulative convictions. Next it contends that *Musema*, which was pre-*Celibici*,⁶ is not good authority and that *Popovic* was wrongly decided.⁷ The Prosecution is wrong on both counts and its Appeal should be denied.

2.1 The general Celebici test was not binding in this case

9. The Prosecution contends that the Trial Chamber failed to apply the law on cumulative convictions as established in the *Celebici* Appeal Judgement.⁸ It argues that the *Celebici* test was binding as the Chamber's findings were based on the same underlying conduct⁹ and as the two crimes had materially distinct elements.¹⁰

10. Contrary to the Prosecution's allegation, the Trial Chamber correctly found that the underlying acts upon which the crime of conspiracy to commit genocide and the crime of genocide are based are distinct,¹¹ although part of the same set of facts. The alleged acts of genocide committed in Rwankuba *secteur*,¹² Kiziguro parish¹³ and Mukarange parish¹⁴ are not the underlying acts but only the bases from which an inference was drawn that an agreement to commit genocide was formed. The underlying act of conspiracy is the inferred agreement and is necessarily distinct, by essence, of the subsequent acts of participation to the genocide. This was clearly formulated by a Trial Chamber in *Popovic*:

⁶ Prosecution's Appellant's Brief, para.33.

⁷ Prosecution's Appellant's Brief, paras.34-35.

⁸ Prosecution's Appellant's Brief, para.13.

⁹ Prosecution's Appellant's Brief, paras.16-22.

¹⁰ Prosecution's Appellant's Brief, para.26.

¹¹ Judgement, para.654.

¹² Prosecution's Appellant's Brief, paras.7-8: (1) Arrival and presence along with other authorities; (2) instructions given to *Interahamwe*; (3) killings that followed.

¹³ Prosecution's Appellant's Brief, paras.9-10: (1) Prior visits to the parish; (2) arrival on 11 April; (3) presence during the separation of Hutus and Tutsis; (4) instructions to kill; (5) organised manner in which the killings were carried out.

¹⁴ Prosecution's Appellant's Brief, paras.11-12: (1) Arrival and presence at the parish; (2) provision of material support; (3) instructions to kill; (4) killings that followed.

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“In the case of conspiracy to commit genocide and genocide, the *Celebici* test has no application since the underlying acts or omissions of the two crimes will always be completely distinct. [...] the *actus reus* of conspiracy to commit genocide is the act of entering into an agreement to commit genocide whereas the *actus reus* of genocide is the commission of one of the enumerated acts in Article 4(2).”¹⁵ [emphasis added]

11. The Trial Chamber therefore rightfully held that the general test set out in *Celebici* was not binding in this case¹⁶ and that the crime of conspiracy to commit genocide was unique by nature and gave rise to an equivocal jurisprudence.¹⁷ The whole Prosecution’s Appeal is based on an erroneous premise and should be dismissed.

2.2 The Chamber correctly relied on the *Musema* and *Popovic* findings and on the fundamental principle of fairness

12. The Prosecution avoids responding to the merits of the *Musema* Judgement by erroneously dismissing it as pre-dating the *Celibici* decision.¹⁸ It also contends that the recent *Popovic* Trial Judgement has been wrongly decided¹⁹ and that the Trial Chamber had the duty to enter convictions for both crimes of conspiracy *and* genocide in order to fully capture the Accused’s criminal culpability.²⁰

13. Contrary to the Prosecution’s allegations, the *Musema* and *Popovic* decisions were legally correct and highly relevant. The Trial Chamber had the discretion to rely on them,²¹ after having carefully assessed the ambiguous jurisprudence of this Tribunal.²²

14. Both the *Musema* Judgement, undisturbed on appeal, and the recent *Popovic* Judgement have conducted an extensive analysis of the law, giving due consideration to both Civil and Common Law systems.²³ Both adopted the definition of conspiracy that was favourable to the accused, whereby a conviction for both genocide and conspiracy could not be entered on the

¹⁵ *Popovic* (TC), para.2118.

¹⁶ Judgement, para.654.

¹⁷ Judgement, para.655.

¹⁸ Prosecution’s Appellant’s Brief, para.33.

¹⁹ Prosecution’s Appellant’s Brief, paras.34-36.

²⁰ Prosecution’s Appellant’s Brief, paras.39-40.

²¹ Judgement, para.661.

²² Judgement, paras.657-658, referring to *Kambanda* (TC) and *Niyitegeka* (TC).

²³ *Popovic* (TC), paras.2117-2123; *Musema* (TC), paras.185-198.

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basis of the same acts of genocide.²⁴ The unique nature of the offence of conspiracy was found to be particularly important in this context.²⁵

15. The Trial Chambers in *Musema* and *Popovic* both stressed that this approach is in keeping with the idea that convictions for conspiracy and genocide were not intended by the legislators to be entered together. They referred to the *travaux préparatoires* of the Genocide Convention showing that the crime of conspiracy was an inchoate crime, intended to punish an agreement which, in and of itself, did not yet constitute genocide; the converse implication being that no purpose would be served in convicting an accused for conspiracy if he has already been found guilty of the substantive offence of genocide for the same set of facts.²⁶

16. The Prosecution's own legal authority,²⁷ the 1946 Supreme Court decision *Pinkerton*, shows that whether or not the offenses may accumulate is a legislative decision.²⁸ The Prosecution misses this key point. The *travaux préparatoires* of the Genocide Convention are clear that the legislators did not intend for the offenses to be cumulative.

17. In the case at bar, the Trial Chamber also correctly held that the circumstances of the *Popovic* decision were very similar to the scenario in the *Gatete* case.²⁹ The proof of the substantive offence (participation to a joint criminal enterprise of genocide) was also the main piece of evidence from which an inference of a prior illegal agreement was drawn and upon which the conspiracy conviction was based.³⁰ Convictions for both conspiracy to commit genocide and genocide, committed through a joint criminal enterprise, were found to be redundant.³¹

²⁴ *Musema* (TC), para.198; *Popovic* (TC), para.2127.

²⁵ *Popovic* (TC), para.2124.

²⁶ *Musema* (TC), para.198; *Popovic* (TC), para.2121 and fn.6121 referring to UN Doc. E/794 and UN Doc. A/C.6/SR/87.

²⁷ Prosecution's Appellant's Brief, para.35 and fn.92.

²⁸ *United States v. Pinkerton*, 328 U.S. 640, 643 (1946): "The common law rule that the substantive offense, if a felony, was merged in the conspiracy has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established." (emphasis added).

²⁹ Judgement, paras.660-661.

³⁰ *Popovic* (TC), para.2124.

³¹ Judgement, para.660.

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18. Because resort to national jurisprudence was of limited utility,³² the Trial Chamber in *Popovic* concluded that the fundamental principle animating the concern regarding multiple convictions should be one of fairness to the accused.³³ It noted the real risk of prejudice, which lies in allowing cumulative convictions, including the punishment and social stigmatisation, as well as the potential impact on a sentence ultimately served.³⁴ It concluded that, once the substantive offence is committed, the justification for punishing the prior conspiracy is less compelling. It serves no purpose anymore of preventing the commission of genocide and even becomes redundant.³⁵

19. This reasoning is legally correct. The Trial Chamber had therefore the discretion to follow an approach that was favourable to the Mr. Gatete³⁶ and not to enter cumulative convictions for genocide (Count 1) and conspiracy (Count 3).³⁷ The Defence submits that this approach should be affirmed by the Appeals Chamber.

2.3 Conclusion

20. The Prosecution's arguments are without merit and should be dismissed.

³² *Popovic* (TC), para.2122.

³³ *Popovic* (TC), para.2123 and fn.6128 referring to *Kunarac* (AC), para.173; *Celebici* (AC), para.412.

³⁴ *Popovic* (TC), para.2123 and fn.6129 referring to *Kunarac* (AC), para.169 ("Care, however, is needed in applying the *Celebici* test for [...] cumulative convictions create 'a very real risk of [...] prejudice' to the accused."), quoting *Celebici* (AC), Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, para.23.

³⁵ *Popovic* (TC), paras.2124,2126.

³⁶ Judgement, para.661.

³⁷ Judgement, para.662.

PART III – RELIEF REQUESTED

B. For the foregoing reasons, Jean-Baptiste Gatete respectfully requests that the Appeals Chamber:

DISMISS the Prosecution’s Appeal in its entirety.

Word Count: 1698

Dated: 4 November 2011

Respectfully submitted,



Marie-Pierre Poulain,
Lead Counsel for Jean-Baptiste Gatete



V. C. Lindsay,
Consultant Counsel



C. Rivat,
Legal Assistant



E. Levasseur,
Legal Assistant



W. Hedef,
Legal Intern

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The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-A

ANNEXE TO GATETE'S RESPONDENT'S BRIEF
Jurisprudence, definitions and abbreviations

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I. JURISPRUDENCE

1.1. International Criminal Tribunal for Rwanda

KAMBANDA

The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-T, Judgement and sentence, 4 September 1998 (“*Kambanda (TC)*”)

MUSEMA

The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement and sentence, 27 January 2000, (“*Musema (TC)*”)

NIYITEGEKA

The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and sentence, 16 May 2003 (“*Niyitegeka (TC)*”)

1.2. International Criminal Tribunal for the Former Yugoslavia

DELALIC ET AL. (“CELEBICI”)

The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Celebici (AC)*”)

KUNARAC ET AL.

The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac (AC)*”)

POPOVIC ET AL.

The Prosecutor v. Vujadin Popovic, Ljubisa Beara, Drago Nikolic, Ljubomir Borovcanin, Radivoje Miletic, Milan Gvero and Vinko Pandurevic, Case No. IT-05-88-T, Judgement, 10 June 2010 (“*Popovic (TC)*”)

1.3. Supreme Court of the United States

United States v. Pinkerton, 328 U.S. 640 (1946)

II. DEFINITIONS AND ABBREVIATIONS

Fn.

Footnote

ICTR or Tribunal

International Criminal Tribunal for Rwanda

Judgement

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-T, Judgement and Sentence, 31 March 2011

Notice of Appeal

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-A, Prosecution's Notice of Appeal, 3 May 2011

P. (pp.)

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Para. (paras.)

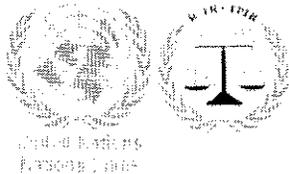
Paragraph (paragraphs)

Prosecution's Appellant's Brief or Prosecution's Appeal

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-A, Prosecution's Appellant's Brief, 18 July 2011

Rules of Procedure and Evidence

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, adopted pursuant to Article 14 of the Statute



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